

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 North 5th Street
Kansas City, Kansas 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

In the matter of:)	
)	DOCKET NO. CWA-07-2003-0206
TIMMERMAN & SONS)	
FEEDING CO., INC)	
)	
Indianola, NE)	
)	FINDINGS OF VIOLATION
Respondent)	ORDER FOR COMPLIANCE
)	
)	
)	
Proceedings under)	
Section 309(a)(3))	
of the Clean Water Act,)	
33 U.S.C. § 1319(a)(3))	
)	

Preliminary Statement

1. The following Findings of Violation and Order for Compliance ("Order") are made and issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency ("EPA") to the Regional Administrator, EPA Region VII, and redelegated to the Director of Region VII's Water, Wetlands, and Pesticides Division.

2. The Respondent is Timmerman & Sons Feeding Co., Inc., ("Respondent"), who owns and operates an animal feeding operation located in the located in the East ½ of Section 10, Township 3N, Range 28E of Red Willow County, Nebraska.

Statutory and Regulatory Authority

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342.

4. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that Section.

5. Section 504(12) of the CWA, 33 U.S.C. § 1362(12), defines the term "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

6. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. Part 122. Under 40 C.F.R. § 122.1, a NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.

7. "Pollutant" is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6), to include biological materials and agricultural waste discharged to water.

8. "Point source" is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation... from which pollutants are or may be discharged."

9. "Concentrated animal feeding operation" is defined by 40 C.F.R. § 122.23(b)(3) as "an 'animal feeding operation' which meets the criteria in Appendix B of this part."

10. Appendix B to 40 C.F.R. § 122.23 states that an animal feeding operation is a concentrated animal feeding operation if the animal feeding operation confines more than 1,000 slaughter and feeder cattle.

11. "Waters of the United States" are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

12. The Nebraska Department of Environmental Quality ("NDEQ") is the agency within the state of Nebraska with the delegated authority to administer the federal NPDES Program pursuant to Section 402 of the CWA, the Nebraska Environmental Protection Act [Secs. 81-1504 (11), Reissue 1987], and the State of Nebraska Department of Environmental Quality, Title 119, Rules and Regulations Pertaining to the Issuance of Permits Under the National Pollutant Discharge Elimination System. EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

Findings of Violation

13. Timmerman & Sons Feeding Co., Inc. is a corporation and is therefore a person as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. Timmerman & Sons Feeding Co., Inc. operates an animal feeding operation ("Facility") located in the located in the East ½ of Section 10, Township 3N, Range 28E of Red Willow County, Nebraska.

15. On March 26, 2003, EPA conducted an NPDES inspection of Respondent's animal feeding operation in Indianola.

16. At the time of the inspection, the Facility confined approximately 11,000 cattle. Since at least July 1998, the number of cattle confined at the Facility has been equivalent to at least 1,000 "animal units" as that term is defined in 40 C.F.R. Part 122, Appendix B.

17. From at least July 1998 to the present, the Facility has confined and fed or maintained cattle for a total of 45 days or more in any 12-month period.

18. From at least July 1998 to the present, neither crops, vegetation, forage growth, nor post-harvest residues have been sustained over any portion of the Facility.

19. The Facility is a "concentrated animal feeding operation" as defined by 40 C.F.R. 122.23(b)(3).

20. The Facility is a "point source" as defined by CWA Section 502(14), 33 U.S.C. § 1362(14).

21. NDEQ granted a NPDES Permit, No. 0037401 on May 3, 1989, to Timmerman & Sons Feeding Co., Inc. for the Indianola Facility. Permit No. 0037401 has been reissued and administratively extended through the present date, and remains fully effective and enforceable.

22. The NPDES permit for the Indianola Facility specifies the storage design and operating requirements, as follows:

A. Part II.A.1. of Permit No. 0037401 provides that the livestock waste controls at the Facility shall be operated so that minimum storage capacity equal to the expected runoff from the 25 year, 24 hour storm event is made available as soon as possible after a runoff event.

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B. Part II.A.1. of Permit No. 0037401 also provides that the livestock waste control facility shall be operated so that minimum design capacity sufficient to accommodate snow melt and spring precipitation runoff be made available prior to the winter months.

C. Part I.C.1. of NPDES Permit No. 0037401 requires that permanent storage capacity identification marks be employed in the retention structures to indicate the liquid level at which the minimum storage capacity and minimum design capacity are available.

23. At the time of the inspection, Respondent had not determined the minimum storage capacity or the minimum design capacity of the waste retention structures.

24. At the time of the inspection, the Indianola Facility did not have identification marks in the retention structures to indicate the liquid level at which the minimum storage capacity and minimum design capacity are available.

25. Respondent's failure to determine the minimum storage capacity and minimum design capacity of the waste retention structures at the Indianola Facility, and failure to install permanent identification marks in the waste retention structures to indicate the liquid levels at which minimum design capacity and minimum storage capacity are available is in violation of NPDES Permit No. 0037401, and a violation of Sections 301(a) and 402 of the CWA, and implementing regulations.

26. Sections A.3 and A.4 of Appendix A of the NPDES permit for the Indianola Facility set forth the monitoring and record-keeping requirements for the Facility, as follows:

A. Appendix A, Section A.4.(e) of NPDES Permit No. 0037401 requires the facility operator to monitor and record on a daily basis the liquid level of the livestock waste retention structures.

B. Appendix A, Section A.3 of NPDES Permit No. 0037401 requires the facility operator to retain all records required by the permit for a period of three years from the date of the measurement or report.

27. At the time of the EPA inspection, Respondent did not have any records of the liquid level of the livestock waste retention structures for the Indianola Facility for the period from July 1998 until April 2003.

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28. Respondent's failure to monitor and record the liquid level of the waste retention structures on a daily basis at the Indianola Facility as required by NPDES Permit No. 0037401 is a violation of the Indianola Facility's NPDES permit and a violation of Sections 301(a) and 402 of the CWA, and implementing regulations.

Compliance Order

Based on the Findings of Violation set forth above, and pursuant to Sections 309(a)(3) and 311(e) of the CWA, 33 U.S.C. §§ 1319(a)(3), 1321(e), Respondent is hereby ORDERED to take the following actions to eliminate its violations of permit conditions and the CWA:

29. Within sixty (60) days of the effective date of this Order, Respondent shall determine the minimum storage capacity and minimum design capacity of the waste retention structures at the Indianola Facility, and install permanent identification marks in the waste retention structures to indicate the liquid levels at which minimum design capacity and minimum storage capacity are available.

30. Respondent shall dewater as needed to maintain minimum storage capacity and minimum design capacity as required by Respondent's NPDES permit.

31. Within thirty (30) days of installing permanent identification marks in the waste retention structures, Respondent shall submit to EPA written confirmation that Respondent has determined the minimum storage capacity and minimum design capacity of the waste retention structures at the Indianola Facility, and installed permanent identification marks in the waste retention structures. Respondent shall include in the submission documentation of the calculation of minimum design and minimum storage capacity.

32. Respondent shall perform monitoring and recordkeeping of precipitation, land application activities, and holding pond liquid levels, as required by Respondent's NPDES permit.

Effect of Order

33. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state and/or federal permits.

34. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect Respondent's facility, and/or to request additional information from Respondent pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318.

35. EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, EPA may amend this Order to address any noncompliance with the CWA, including, but not limited to, any noncompliance with the requirements of Section 402 of the CWA. In the event of any such subsequent amendment to this Order, all requirements for performance of this Order not affected by the amendment shall remain as specified by this original Order.

36. If any provision or authority of this Order, or the application of this Order to Respondent is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

37. All submissions to EPA required by this Order shall be sent to:

Paula Higbee
CAFO Enforcement Coordinator
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, KS 66101

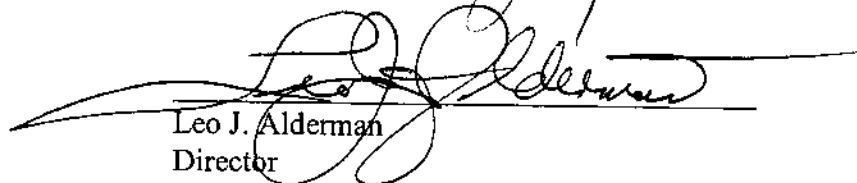
38. Pursuant to 40 C.F.R. §§ 2.201 - 2.311, Respondent may assert a business confidentiality claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate envelope labeled, "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows EPA to release the submitted information to the public without further notice. EPA may disclose information subject to the business confidentiality claim only to the extent set forth in the above-cited regulations. Special rules governing information obtained under the Clean Water Act appear in 40 C.F.R. § 2.302.

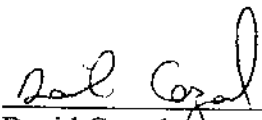
39. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondent to (1) civil penalties of up to \$27,500 per day for each violation, pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

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40. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

Dated this 3rd day of July, 2003


Leo J. Alderman
Director
Water, Wetlands, and Pesticides Division


David Cozad
Associate Regional Counsel

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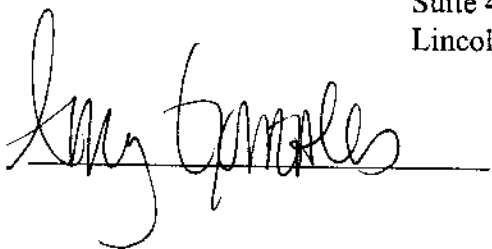
CERTIFICATE OF SERVICE

I certify that on the date note below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region VII. I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance together with cover letter and small business assistance information, to the following representative of Timmerman and Sons Feeding Co., Inc.:

Mr. Gerald Timmerman
Timmerman and Sons Feeding Co., Inc.
165 South 2nd Street
Springfield, NE 68059

I further certify that on the date noted below, I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance to the following representative of the State of Nebraska:

Dennis Heitmann
Supervisor, Agriculture Section
Water Quality Division
Nebraska Department of Environmental Quality
Suite 400, 1200 N Street, The Atrium
Lincoln, NE 68509



7/3/03
Date